TESTIMONY BEFORE THE UNITED STATES SENATE
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

HEARING ON THE SUPREME COURT=S DECISIONS IN
BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT,
KIMEL v. FLORIDA BOARD OF REGENTS, and *ALDEN v. MAINE*

April 4, 2001

Testimony of
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Before U.S. Senate Comm. on
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Thank you, Mr. Chairman, for asking me to testify on this important issue regarding Congress=s power to redress serious and pervasive discrimination. I hold the Thomas H. Lee Chair in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University, specialize the constitutional boundaries of congressional power, and clerked for Justice Sandra Day O=Connor. In addition, I was lead counsel for the successful City of Boerne, Texas in *Boerne v. Flores*, 521 U.S. 507 (1997), a seminal federalism case.

In the last four years, the Supreme Court has clarified the constitutional boundaries of Congress=s power under Section 5 of the Fourteenth Amendment and the extent of its power to regulate the states in light of the Eleventh Amendment through a series of cases beginning with *Boerne v. Flores*, 521 U.S. 507 (1997), and further developed in the cases that are the focus of today=s hearing, *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955 (2001), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Alden v. Maine*, 527 U.S. 706 (1999).

They present two interrelated questions. First, under what power may Congress enact an anti-discrimination law. Second, does the Eleventh Amendment preclude suits by citizens against state governments for damages.

The Power of Congress to Redress Discrimination

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Congress may attack discrimination through a number of powers, including the Commerce Clause, the Spending Clause, and Section 5 of the Fourteenth Amendment. The former two are not the topic of today=s hearing.

Congress may directly attack unconstitutional discrimination through Section 5 of the Fourteenth Amendment, which provides that Congress Ashall have power to enforce, by appropriate legislation, the provisions of this article.@ This is an extraordinarily important provision that gives Congress power to ensure that the states abide by the equality and liberty principles in the Fourteenth Amendment.

Under the text of the Constitution and the cases we consider today, the key to this provision is that the Congress holds not plenary power to enforce any rights, but rather the power to enforce *constitutional* rights. Therefore, for Congress to act within constitutional parameters under Section 5, it must aim its legislation toward remedying constitutional violations. There are two tacks Congress may take:

(1) Congress may provide a remedy that directly addresses identified constitutional violations in a one-to-one ratio.

(2) Congress may enact so-called prophylactic legislation, legislation that makes otherwise constitutional state action illegal for the purpose of thwarting or remedying the states= constitutional violations. The Religious Freedom Restoration Act, the Age Discrimination in Employment Act, Title II of the Americans with Disabilities Act, and the Fair Labor Standards

Act of 1938, are all examples of prophylactic legislation, that is, legislation that is not triggered by a single, proven constitutional violation but rather makes illegal that which would be otherwise legal for the states to do. In other words, it extends individual rights against the states beyond constitutional requirements.

Prophylactic legislation must meet the following requirements for the law to be sufficiently solicitous of the dual sovereignty of the states:

> 1. The unconstitutional discrimination cannot be merely isolated incidences (those can be redressed with a one-to-one remedy), but rather must be **Awidespread and persisting@** in the states. *See e.g., Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999); *Kimel*, 528 U.S. at 62; *Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 955 (2001).

This is a threshold inquiry. If the states are not engaging in unconstitutional conduct, are themselves redressing unconstitutional conduct, or only an isolated number of incidents have occurred, the Congress lacks the power to pass prophylactic legislation that sweeps broader than the Constitution requires. The Court will not presume that the states are acting unconstitutionally. If it is widely understood that the states are engaging in unconstitutional conduct or there is a record that shows as much (either generated by Congress, commissions,

industry, or scholars), this prong is met.

2. Congress=s chosen remedy must be **Aproportional and congruent@** to the scope and incidence of constitutional violations in the states. *See Garrett*, 121 S. Ct. at 955; *Kimel*, 528 U.S. at 82-83; Alden, 527 U.S. at 706; *Boerne*, 521 U.S. at 507.

This requirement is a familiar principle from the law of remedies that poses two questions: (a) is the law aimed at the permissible goal under Section 5, which is to eliminate unconstitutional state action and (b) do the means fit the end?

Eleventh Amendment Limitations on Congress=s Power

If the law is a valid exercise of Congress=s Section 5 powers, the Eleventh Amendment is no bar to congressional regulation of the states. The Indian Gaming Regulatory Act, enacted pursuant to Article I, in contrast, may not be imposed against the states in suits for damages, pursuant to the Eleventh Amendment. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-3 (1996) (AThe Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction@); *Garrett*, 121 S. Ct. at 955 (ACongress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.... As a result, we concluded, Congress may subject nonconsenting States to

suit in federal court when it does so pursuant to a valid exercise of its ' 5 power.@); *Kimel*, 528 U.S. at 79 (AUnder our firmly established precedent then, if the [Age Discrimination in Employment Act of 1967] rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.@) This is why the Eleventh Amendment cases have been turning on whether or not Congress has validly exercised its powers under Section 5 of the Fourteenth Amendment.

The three prophylactic laws at issue in the cases that are the subject of this hearing were found to be unconstitutional under Section 5 of the Fourteenth Amendment and therefore they could not, pursuant to the Eleventh Amendment, be imposed against the states in damage actions. In *Garrett*, 121 S. Ct. at 955, Title II of the Americans with Disabilities Act failed, because the evidence of widespread and persisting unconstitutional action by the states was thin. The record revealed discrimination by private actors, isolated state actors, and the fact that many states prohibit discrimination against the disabled already. A prophylactic remedy, therefore, was not necessary. The law also failed the proportionality test, because the remedy swept far beyond outlawing unconstitutional action in a circumstance where the states were not engaging in widespread and persisting unconstitutional action.

The Age Discrimination in Employment Act in *Kimel* was found unconstitutional because, after applying the Acongruence and proportionality@ test expounded in previous cases, Ait is clear that the ADEA is >so out of proportion to a supposed remedial or preventive object that it

cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,@ 528 U.S. at 86 (quoting *Boerne,* 521 U.S. at 532).

The Fair Labor Standards Act of 1938 also failed Section 5 analysis, because it was not congruent and proportional to a set of widespread and persisting state unconstitutional actions. *See Alden*, 527 U.S. at 706.

In sum, where there is unconstitutional discrimination throughout the states, Congress has broad latitude to enact prophylactic legislation that makes illegal state action that would otherwise be legal for the purpose of stamping out that unconstitutional discrimination. *See Boerne*, 521 U.S. at 518 (ALegislation which deters or remedies constitutional violations can fall within the sweep of Congress=s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into >legislative spheres of autonomy previously reserved to the States=@ (citation omitted)). As the Court has made clear, the civil rights laws are constitutional under this formulation. *Id.* at 524; *Kimel*; *see also* 528 U.S. at 62; *Garrett*, 121 S. Ct. at 955.

If the discrimination worrying Congress is not constitutionally prohibited, Section 5 of the Fourteenth Amendment is not the proper vehicle for legislation. Rather, the Commerce and Spending Powers come into play. In those circumstances, the Eleventh Amendment precludes damage actions against the states, but it leaves open a number of other avenues, which were pointedly identified in *Garrett*:

> Our holding here that Congress did not validly abrogate the States= sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as private individuals in actions for injunctive relief.... In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

121 S. Ct. 955, n.9.

It is my view that the recent cases do not invalidate the vast majority of congressional lawmaking. They also bring Congress back to James Madison=s admonition that Congress bears responsibility to examine carefully the constitutional basis of its actions:

> [I]t is incontrovertibly of as much importance to this branch of government [Congress] as to any other, that the constitution should be preserved entire. It is our duty.

1 Annals of Congress 500 (1789), quoted in *Boerne*, 521 U.S. at 534. This hearing is in the noble spirit of this aspiration and brings honor to the Senate and this Committee.

Thank you again for the honor of testifying before this Committee on these important

constitutional issues.